

To Leave Or Not To Leave: The Interplay of California's Leave Laws and the FLSA



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Just when it seems like doing business in California cannot get any more challenging, your employee—who is exempt from FLSA’s overtime protection—requires leave under one of California’s several leave laws. California allows for job-protected leave for Jury or Witness Duty, Kin Care, Crime Victims Leave, Voting Time Off, School Activities Leave, Volunteer Firefighter Training, Military Leave, Volunteer Civil Service Leave, as well as Organ and Bone Marrow Donor Leave. However, California’s unique job-protected leave laws were not necessarily contemplated under the U.S. Department of Labor’s Fair Labor Standards Act (“FLSA”), as the FLSA does not require payment for time not worked, such as sick leave, jury duty, funeral leave, etc. This poses an interesting question for employers: how do they reconcile California’s leave laws with FLSA’s exempt requirements to maintain their employee’s “salaried status”?

The FLSA regulates a broad field of employment practices including payment of the minimum wage, overtime, equal pay, and child labor laws. Generally, the FLSA applies to employees in industries engaged in or producing goods for interstate commerce absent an exemption. Most FLSA litigation concerns whether an employee is properly classified as “exempt” from FLSA overtime requirements. To be properly classified as exempt, an employee must satisfy a salary basis test and a job duties test. The salary basis test requires that the employee regularly receives a predetermined salary, that is typically not reduced due to the variations in quality or quantity of the employee’s work performed.

Pursuant to the salary basis test, an exempt employee must receive their full salary for any week in which he or she performs any work without regard to the number of days or hours worked. Under the FLSA, an employer’s deductions for certain types of absences do not affect the employee’s exempt status. However, a problem may occur when an employee takes unpaid leave for less than a full day’s work because the employee’s unpaid leave necessarily impacts an employer’s ability to establish the salary basis test under the FLSA.

It is unclear how the FLSA’s “salary basis” test will be applied in California, as California law requires that a minimum monthly salary is paid under Labor Code section 515(a). Under California wage and hour law, the employee must earn a minimum monthly salary of no less than two times the state minimum wage for full-time employment to satisfy part of the exemption analysis. Although there are marked differences between California’s labor laws and the FLSA, the FLSA may serve as a guide where there is no conflict. California wage and hour laws have yet to address the impact of a salaried employee taking job-protected leave on an employee’s exempt status, therefore, until proven otherwise, it is appropriate for employers to turn to the FLSA.

Under the FLSA, without affecting an employee’s “salaried status,” pay may be deducted for full-day absences related to sickness or disability (including work-related accidents), regardless of

whether the employee is eligible for compensation under the employer's sick leave or disability plan. This means that employees taking unpaid FMLA job-protected leave related to that employee's sickness, do not lose their exempt status for taking such leave under the FLSA. However, deductions for partial-day absences signal that the employee is not salaried and thus, not exempt from overtime requirements. Thus, employees on intermittent leave that request to use a half-day in lieu of a full-day's leave would not maintain their exempt status while taking a half-day of unpaid leave under the FLSA guidance.

Similarly, an employee's "salaried" status is not affected by pay deductions for absences from a full-day's work for certain personal reasons other than sickness or disability. However, this does not extend to deductions for absences related to jury duty, witness-related attendance, or temporary military leave. Unpaid leave for these types of absences would impact the employee's exempt status. However, under the FLSA, an employer can offset any jury fees, witness fees, or military pay against the employee's salary without losing the employee's exempt status.

A further issue arises for partial-day absences under the FLSA. When an employer docks pay for a partial-day absence, the employee does not meet the "salary basis" test and is no longer exempt from overtime pay requirements. Employers may use accrued vacation pay to make up for the partial day absence without impacting their salaried status. To maintain the employee's exempt status when no vacation pay is available, under FLSA, an employer may be required to give the employee additional time off.

Until California courts reconcile California's many leave laws with FLSA's exemption test, California employers should approach their employee's unpaid leave with caution. As always, employers should ensure they have written leave of absence or sick leave policies addressing California's leave laws that outline the deductions that may be made to salaried exempt employees' pay for their absences.

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Prior to joining O'Hagan Meyer, Gouya was a solo practitioner practicing Civil Litigation in the areas of business litigation, employment law, and consumer protection. In her solo practice, Gouya served as General Counsel for a pharmaceutical company and Of Counsel for a boutique law firm in Newport Beach. Gouya also has experience litigating consumer class actions and individual claims focusing on the Fair Debt Collection Practices Act (FDCPA), the Rosenthal Fair Debt Collection Practices Act (RFDCPA), the Telephone Consumer Protection Act (TCPA), the Fair Credit Reporting Act (FCRA), and various other consumer financial statutes.

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